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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
of 1996)
)
Joint Petition of BellSouth, SBC and)
Verizon for Elimination of Mandatory)
Unbundling of High-Capacity Loops and)
Dedicated Transport)

CC Docket No. 96-98

REPLY COMMENTS OF NEWSOUTH COMMUNICATIONS

NewSouth Communications ("NewSouth") submits these reply comments in response to the Joint Petition ("Petition") filed by BellSouth, SBC and Verizon ("Petitioners") requesting that the Commission remove high capacity loops and dedicated transport from the list of network elements that must be unbundled pursuant to section 251(c)(3). The record in this proceeding overwhelmingly demonstrates that the Petition is procedurally defective and substantively merit less.

I. The Joint Petition Should be Dismissed as Premature

On April, 25, 2001, NewSouth filed a motion to dismiss the Petition as grossly premature. NewSouth pointed out that the petition was filed in violation of the Commission's order establishing a three-year quiet period and suffered other fatal procedural defects. A number of commenters support NewSouth's motion and join in seeking the immediate dismissal

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of the Petition.¹ The comments also confirm NewSouth's concerns that just entertaining the Petition would undermine the market certainty that the Commission sought to establish through adoption of the three-year quiet period. Carriers predicated business plans, entered markets, and expended capital in reliance on the availability to these network elements for a period of at least three years.² Market confusion and uncertainty will continue as long as this Petition is pending. The Commission should thus act expeditiously to deny the Petition.

Although the comment cycle is now closed on the petition, the Commission can still send a powerful signal to the BOCs, the competitive industry and to the financial community by summarily dismissing the petition and reaffirming its commitment to a periodic, methodical and predictable process for reviewing the scope of the statute's unbundling requirements. The Commission should thus reaffirm its commitment to the triennial review process, with one important modification. Given that the Petitioners have forced the industry to expend the time and resources to demonstrate, once again, that there are insufficient alternatives to incumbent LEC high capacity loops and transport -- a demonstration that has been made convincingly -- the industry should not have to reproduce such evidence again at the first triennial review. Rather, consistent with the suggestion of IP Communications, the Commission should dismiss the

¹ See, e.g., Comments of AES Communications, LLC ("AES Comments") at 5-6; Joint Comments of Broadslate, Inc., Network Plus, Inc., RCN Telecom Services, Inc., Telergy, Inc. ("Broadslate Comments") at 8; Joint Comments of Cbeyond Communications, LLC, CTC Exchange Services, LLC, E.Spire Communications, Inc., Intermedia Communications, Inc., KMC Telecom Holdings, Inc., Net2000 Communications Services, Inc., and Nuvox, Inc. ("CLEC Coalition Comments") at 6; Comments of the Competitive Telecommunications Association ("CompTel Comments") at 3-4; Joint Comments of El Paso Networks, LLC and Global Broadband, Inc. ("El Paso Comments") at 5; Comments of McLeodUSA Telecommunications Services, Inc. ("McLeodUSA Comments") at 1; Comments of Sprint Corporation ("Sprint Comments") at 16-17; Comments of Worldcom ("WorldCom Comments") at 4; Comments of XO Communications, Inc. ("XO Comments") at 6; Comments of Yipes Transmission, Inc. ("Yipes Comments") at 5-6.

² See, e.g., Comments of Advanced TeleCom Group, Inc. ("ATG Comments") at 3; AES Comments at 4-5; El Paso Comments at 15 (noting that EPN and Global Broadband are just beginning to execute business plans predicated on use of ILEC dark fiber); Comments of Conversent Communications, LLC ("Conversent Comments") at 3-4 (noting that identification of UNE dark fiber provided certainty to Conversent's business plan which has been undermined by petition); Comments of Enron Broadband Services ("Enron Comments") at 5-6; Yipes Comments at 6. Z-Tel quotes the testimony of one telecommunications analyst that equity investors cite regulatory uncertainty as one of the principal reasons for avoiding the CLEC sector. Comments of Z-Tel Communications, Inc. at 11-12.

petition and re-set the three-year quiet period for these network elements from the effective date of the rejection of this Petition.³

II. The Record Convincingly Shows that High Capacity Loops and Dedicated Transport Readily Meet the Impairment Test

Petitioners argue that sufficient alternatives to ILEC high capacity loops and dedicated transport have materialized to warrant their removal from the list of unbundled network elements. To the contrary, the comments provide persuasive evidence that in fact there are no alternatives to the ILECs' ubiquitous networks. The comments also offer a devastating critique of the USTA Report relied upon by the Petitioners as the grounds for their assertion that an "avalanche" of fiber capacity exists to provide alternative facilities whenever the demand exists.⁴

Petitioners' argument that the market for local fiber capacity has changed so dramatically over the past two years as to warrant revisiting the Commission's unbundling rules hinges on the "USTA Report" prepared by an attorney for BellSouth, SBC, Qwest and Verizon.⁵ The record demonstrates that the USTA Report is riddled with errors.⁶ For example, the Petition cites the USTA Report for the proposition that, "[i]n mid-1999, CLECS had 160,000 *local* fiber miles, by year-end 2000 they had 218,000."⁷ Commenters note, however, that this figure includes long

³ Comments of IP Communications at 7.

⁴ The Petitioners also rely on the declaration of Dr. Robert Crandall that purports to demonstrate the circumstances under which it would be economic to construct facilities. As AT&T points out, the Crandall Declaration is premised on theoretical models and the Commission has consistently held that the impairment analysis should be based on marketplace realities, not hypothetical models. Comments of AT&T Corporation ("AT&T Comments") at 9.

⁵ United States Telecom Association, Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport ("USTA Report") *in* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport at Attachment B (filed April 5, 2001) ("Petition"). Interestingly, Qwest opposes the Joint Petition on the grounds that it is premature in light of pending litigation on the impairment standard and UNE pricing. Comments of Qwest Communications Corporation ("Qwest Comments") at 3. The pending litigation is yet another reason to summarily dismiss the petition.

⁶ See *e.g.*, AT&T Comments at 9-11; CompTel Comments at 27-31, Sprint Comments at 3-4; WorldCom Comments at Attachment A, 1-7; XO Comments at 12-19.

⁷ Petition at 3 (emphasis added).

haul fiber, as well as local fiber miles.⁸ Long haul fiber is not a substitute for local loops or interoffice dedicated transport.⁹ The USTA Report's statistics on the number of route miles of fiber thus provide no basis for concluding that there are alternatives to the ILECs' network facilities. The USTA Report contains other errors as noted by the commenters.

To cite two further examples, the USTA Report exaggerates the number of commercial buildings served by competing fiber providers and the increase in CLECs' market share for special access services.¹⁰

Equally if not more compelling evidence of the USTA Report's fallacies lies in the comments of the carriers cited in the report as having fiber capacity available. The comments filed by these carriers flatly contradict the extent of available capacity attributed to them by the USTA Report. Yipes, for example, notes that it is one of nine carriers identified in the USTA Report as wholesale providers, yet Yipes states that it does not wholesale any fiber whatsoever.¹¹ The Petitioners also cite to the networks of the carriers in the Coalition of Competitive Fiber Providers as evidence that there presently exists a sufficiently robust wholesale market to effectively preclude a finding of impairment.¹² The coalition's comments soundly refute this premise. They point out that the USTA Report makes no attempt to differentiate between existing networks and planned networks and that its members "have just begun the process of building out networks that the BOC Petition assumes are now available to provide competitive

⁸ See e.g., Comments of Allegiance Telecom, Inc. and Focal Communications Corporation ("Allegiance/Focal Comments") at 19-20; Comments of the Association of Communications Enterprises ("ASCENT Comments") at 8; Coalition of Competitive Fiber Providers ("Competitive Fiber Providers Comments") at 6-7; El Paso Comments at 12; XO Comments at 16.

⁹ See e.g., CompTel Comments at 28; Sprint Comments at 3; WorldCom Comments at 19; Yipes Comments at 21.

¹⁰ See, e.g., Allegiance/Focal Comments at 24-27; ASCENT Comments at 9; AT&T Comments at 7-8; CLEC Coalition Comments at 18; Coalition of Competitive Fiber Providers at 8; Sprint Comments at 3; WorldCom Comments at 7-8; XO Comments at 14; Yipes Comments at 18-20.

¹¹ Yipes Comments at 14. See also Allegiance/Focal Comments at 20-21 (Allegiance notes that New Paradigm Report on which the USTA Report relies incorrectly states that Allegiance has 15,000 route miles of fiber, Allegiance currently has traffic on less than 5,000 miles and that fiber is leased from third parties); Comments of TDS Metrocom ("TDS Metrocom") Comments at 7.

¹² Petition at 3-4.

services to CLECs.”¹³ The coalition affirms that “their networks do not now provide a ubiquitous substitute” for ILEC facilities.¹⁴

NewSouth can further attest to the inaccuracy of the USTA Report which identifies NewSouth as one of the competing carriers with a fiber network in Greenville, South Carolina.¹⁵ In fact, NewSouth does not have a fiber network in Greenville.

The statements by the purported suppliers of wholesale fiber capacity that they do not yet provide ubiquitous alternatives to ILEC facilities are confirmed by the carriers seeking to provide retail competition. Carrier after carrier has filed comments in this proceeding affirming that there are currently no alternatives to ILEC high capacity loops and dedicated transport, and that their ability to provide competitive service would be impaired, indeed potentially eliminated, without continuing access to those network elements.¹⁶ Significantly, many of these carriers are facilities-based providers of competitive services. Their comments refute the Petitioners’ canard that the continued availability of unbundled network elements deters investment in network facilities. Instead, unbundled network elements enable facilities-based carriers to fill out their networks by providing last-mile connectivity to customers and the interoffice transport needed between collocation sites in ILEC central offices and the competing carriers’ switch or node.¹⁷

¹³ Coalition of Competitive Fiber Provider Comments at 3-4.

¹⁴ *Id.* at 5. *See also* Allegiance/Focal Comments at 21-22 (noting that of the nine wholesale providers, only five actually have their own networks up and running and of those, only two are operational in more than four cities).

¹⁵ USTA Report at B-6 (identifying NewSouth as a carrier with a fiber network in MSA 64, Greenville, Spartanburg, Anderson, S.C.).

¹⁶ AES Comments at 8-18; Allegiance/Focal Comments at 6-8; ATG Comments at 3-4; CLEC Coalition Comments at 21, 30; Comments of the CLEC Council of the United States Telecom Association at 4-5; Conversent Comments at 7 (third party vendors do not have fiber where Conversent needs it -- between ILEC central offices); Comments of Penn Telecom, Inc. at 2, 6; TDS Metrocom Comments at 5. *See also* Comments of the New York Public Service Commission at 1 (competitors do not have alternatives to Verizon’s high-capacity loops and dedicated transport).

¹⁷ *See, e.g.,* Allegiance/Focal Comments at 10-11, 23 (Only 37 out of 687 central offices in which Allegiance is collocated are connected via fiber Allegiance leases from non-ILEC carriers; only 30 of Focal’s 244 collocated end offices are connected via Focal’s fiber); Conversent Comments at 4-7; CLEC Coalition Comments at 36; TDS Metrocom Comments at 3

Much of the evidence of available alternatives submitted by the Petitioners is predicated on the “unique” characteristics of the “special access market,” *i.e.*, highly concentrated very large businesses customers that “spend a lot of money on telecommunications service.”¹⁸ Petitioners seek to use evidence that competitors are not impaired in their ability to serve this unique special access market to support lifting the unbundling requirement for high capacity loops and dedicated transport in all instances. The comments demonstrate, however, that high capacity loops and dedicated transport are in fact used by competing carriers, in conjunction with their own switches or other facilities, to provide a wide variety of innovative local, as well as interstate, voice and data services to small and medium sized businesses, often in secondary markets.¹⁹ Whatever the merits of Petitioners arguments concerning impairment of the “special access market” as they define it, Petitioners have provided no evidence to support the removal of these unbundled network elements in all cases.

Even USTA, the only commenter to support the Petition, tacitly acknowledges as much. It does so by recommending a procedure, albeit a very flawed one, to permit competitors to continue to obtain access to these network elements in discrete areas for local exchange service, but not for the “exchange access market.”²⁰ (How USTA jumped from the “special access market” to the “exchange access market” is unexplained.) Apart from suggesting this procedure, USTA’s comments simply parrot the Petition and reiterate the discredited “facts” contained in

¹⁸ Crandall Declaration at 4 *in* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Reply Comments of United States Telecom Association (filed April 30, 2001).

¹⁹ *See e.g.*, AES Comments at 6, 9 (AES provides advanced, bundled service to small and medium sized businesses); Allegiance/Focal Comments at 6 (Allegiance uses unbundled T-1 lines to provide a package of voice and data services to customers between eight and twenty lines); ATG Comments at 1; Broadslate Comments at 18 (describing use of DS1 loops to provide local service in suburban markets); TDS Metrocom Comments at 4 (TDS Metrocom uses channelized high capacity loops to provide high quality voice service to businesses with as few as 10 lines); Yipes Comments at 17 (Yipes does not use high capacity loops and dedicated transport for special access but rather to complete links in virtual private data networks for its customers). *See generally* Copper Mountain Comments at 2 (Copper Mountain’s products enable its customers to use high capacity loops and dedicated transport to offer innovative, ubiquitous and cost-effective broadband and local voice services to the small and medium size business and residential markets).

²⁰ USTA Comments at 16-17.

the USTA Report. USTA's suggested procedure would establish a presumption that carriers are not impaired without access to these network elements and then require competing carriers to rebut that presumption by demonstrating that they are impaired in their provision of local exchange services in a discrete area. Such a procedure would be an administrative nightmare, lead to intolerable delays and litigation expense, and preclude carriers from making long term plans or committing resources.

Finally, Petitioners argue that requiring unbundled access to these network elements stifles innovation and investment in advanced services technology. Apart from the irony of arguing at the same time that there has been an veritable explosion of investment in fiber capacity and network construction while the unbundling obligation has been in place, the contention looks to the wrong place for innovation. Innovation in improved technologies occurs not in the "dumb" pipes connecting providers to their customers, but in the network equipment -- the packet switches, soft switches and routers -- attached to those pipes.²¹ This equipment is transforming the network from an analog network to a digital network.²² Competing carriers need access to high capacity "pipes" capable of rapidly transmitting the digital information generated by such equipment and, as demonstrated in this record, the incumbent LECs' networks remain the sole source for such pipes in most locations.

²¹ See e.g., Copper Mountain Comments at 3-5 (describing Copper Mountain equipment used by CLECs to expand broadband services utilizing incumbent LEC T1 loops).

²² There is no detrimental affect on the investment in this equipment as a result of the requirement that incumbent LECs unbundle combinations of loops, circuit switches and shared transport (the UNE-platform of "UNEP"). As indicated in NewSouth's *ex parte* filing in this docket on April 20, 2001, UNEP allows NewSouth to add local voice service offerings to its DSL and other data services provided through NewSouth's own switches and routers. Indeed UNEP facilitates advanced services competition by enabling competitors to provide robust offerings of bundled voice and data services.

III. NewSouth's Ability to Provide Competitive Service Would Be Impaired Without Access to High Capacity Loops and Dedicated Transport

NewSouth's experience has been consistent with those of other carriers filing comments in this proceeding. NewSouth is an Integrated Communications Provider (ICP) serving businesses customers in tier I through tier 4 markets in nine states in the southeast region. NewSouth has deployed thirteen Cisco New World (ATM+IP) packet-based switches and thirteen Lucent 5ESS-2000 voice switches through which it offers local, long distance, voice and data services. Through this technology, NewSouth offers a complete range of local and long distance voice services and a variety of data services, including ATM, Frame Relay, Virtual Private Networks as well as high speed dedicated internet access. To date, NewSouth has installed over 100,000 lines.


NewSouth's predominate method of delivering these various services is the purchase of unbundled DS1 loops from the incumbent LEC which are connected to NewSouth's equipment collocated in the incumbent's central offices where those loops terminate. In virtually every instance, the incumbent LEC is the only provider with connections to the end user for DS1 circuits. In order to provide facilities-based service to end users, NewSouth has, or is in the process of installing, over 80 collocation arrangements. It is NewSouth's experience that, despite its desire to use third party providers, they do not have the capacity in the places where NewSouth needs it. The incumbent LEC is the only carrier from which NewSouth can obtain transport between the incumbent LEC wire centers. In a few instances, another carrier may be able to provide a link between two or three incumbent LEC wire centers in a LATA. Utilizing those links is, however, highly inefficient and increases NewSouth's costs because NewSouth must coordinate that transport with the transport provided by the incumbent LEC for the remainder of the wire centers.

IV. Conclusion

For the reasons set forth above, the Commission should reject the Petition and restart the three-year quiet period in order to restore certainty in the market and permit carriers to fulfill their business plans.

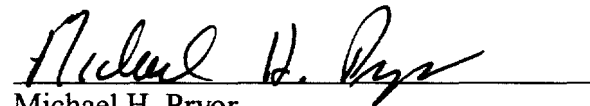
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CERTIFICATE OF SERVICE

I, Christopher Bjornson, hereby certify that on this 25th day of June 2001, I caused copies of the foregoing Reply Comments of Cablevision Lightpath, Inc. to be served by hand delivery or by first class mail (*) on the following:

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